Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

80-111

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.....

ANNA BARR AND ABRAHAM BARR, as Administrators DeBonis non of the goods, chattels and credits of THOMAS NATHANIEL BARR, Deceased,

Petitioner.

v.

THE CITY OF NEW YORK AND NEW YORK HEALTH AND HOSPITAL CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH, M.D., NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA, M.D., AND KIMITRIOS KOTSILUMBUS, M.D.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~COURT OF APPEALS FOR THE STATE OF~~ NEW YORK ~~AND APPELLATE DIVISION SECOND DEPARTMENT~~ Sup Ct, Queens Cty

GERALD MURRAY
Counsel for Petitioner

Office & P.O. Address
90-61 Sutphin Boulevard
Jamaica, New York 11435

6/6/79
(p. 3A)

QUESTIONS PRESENTED

Whether under the fifth and fourteenth amendments the plaintiffs were deprived of property without due process of law and a fair trial.

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondents.

The Petitioner prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals entered in the above case on May 29, 1979.

OPINIONS BELOW

The Supreme Court rendered its opinion after motion for summary judgment and are reprinted in the Appendix at pp. 1A through A. There were no opinions rendered by the Court of Appeals and Appellate Division; the affirmance by the Court of Appeals and Appellate Division are unreported.

JURISDICTION

The judgment of the New York Court of Appeals was made and entered on May 29th, 1980, and copies thereof are appended to this petition in the Appendix at p. A. The jurisdiction of this Court is invoked under the fifth and fourteenth amendment.

QUESTIONS PRESENTED

Whether under the fifth and fourteenth amendments the plaintiffs were deprived of property without due process of law.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT

This suit is for wrongful death concerning the claims of medical malpractice which occurred at Jamaica Hospital during a period of hospitalization which commenced on April 2nd, 1970 and terminated on the death of the above named THOMAS NATHANIEL BARR on April 13th, 1970. The plaintiffs basically claim because of fraud they were prevented from learning of the death until June of 1974 and thereafter prosecuted this action diligently. The defendants made a motion for summary judgment based on the statutes of limitation which was granted by the Court below. The basic contention of the Plaintiffs is that by the granting of the motion the Plaintiffs was not entitled to a trial on the merits and was deprived of due process under the law under the fifth and fourteenth amendments.

REASONS FOR GRANTING THE WRIT

The decision in the Court below and the affirmance thereof, thereby acquiescing to the opinion below are in conflict with the Constitution, United States Supreme Court cases and equitable principles for a fair trial and a hearing on the merits.

As early as 1895 the United States Supreme Court in the case of Central Land Co., vs. Laidley 159 U.S. 103 held that when the parties have been fully heard in the regular course of judicial proceedings an erroneous decision by a State Court does not deprive the unsuccessful party of his property without due process of law within the fourteenth amendment of the Constitution of the United States.

A fortiori, the plaintiffs in the case at bar did not have a full hearing as contemplated by the fourteenth amendment. The case of Fuentes vs. Shevin 407 U.S. 67 holds that Florida and Pennsylvania pre-judgment replevin provisions work a deprivation of property without due process of law insofar as a deny the right to a prior opportunity to be heard. And on page 82 it is an interesting quotation from that case of the Courts language:

"This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case,"

Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subseqent proceedings (if any), " Boddie v. Connecticut, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect....."That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, supra, at 378-379 (emphasis in original)."

An interesting quotation appears in Brinkerhoff-Faris Trust and Savings Co., v. Hill 281 U.S. 673 at page 682, "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which a state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it".

In the case of Wheeler v. Jackson 137 U.S. 245 at page 258 an interesting quotation, "A statute of limitation cannot be said to impair the obligation of a contract, or to deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit."

The facts shown by plaintiff appellants affidavits and testimony referred to at 8A-11A are in variance with what his honor states they are in his memorandum at page 3A and 4A.

CONCLUSION

The Courts should very jealously guard the granting of summary judgment without a trial. Especially in case at bar where the judge appoints himself a fact finder without a hearing as guaranteed by the Fifth and Fourteenth Amendments.

It is respectfully urged that this is the affect of the decision in the Courts below in the Barr case.

.....

GERALD MURRAY

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of May A.D. 1980

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding

---

2 Mo. No. 414
Anna Barr & ano., as Administrators &c. Thomas Nathaniel Barr, Deceased,
Appellants,
vs.
The City of New York, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Clerk of the Court

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Queens at the Courthouse located at 88-11 Sutphin Blvd. in Jamaica, Queens on the 27th day of June, 1980.

P R E S E N T :

HON. JOSEPH J. KUNZEMAN

JUSTICE.

ANNA BARR AND ABRAHAM BARR, AS ADMINISTRATORS DE BONIS non of the goods, chattels and credits of THOMAS NATHANIEL BARR, Deceased,

Plaintiffs

-aganist-

THE CITY OF NEW YORK AND NEW YORK HEALTH & HOSPITALS CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH,M.D., NORBERT GERSTEN HABER, M.D., GEORGE OTEIFA, M.D., and DIMITRIOS KOTSILUMBUS, M.D.,

Defendants

---x

A motion by defendant Jamaica Hospital, having regularly come on to be heard in the above-captioned matter for dismissal based upon the statue of limitations, and upon reading and filing the notice of motion dated February 5, 1979, the affirmation of Daniel J. Dillon dated February 6, 1979 in support thereof, the affidavit of Anna Barr duly sworn to on March 15, 1979 in opposition thereto, and the undated brief of Gerald Murray, attorney for the plaintiff, submitted in opposition thereto, and the reply affirmation of John R. O'Connor dated March 26, 1979.and Health & Hospital Corporation having regularly come on to be heard in the above-captioned matter seeking dismissal based on a failure to state a cause of action, and upon reading and filing the notice of cross-motion dated February 28, 1979 and the affirmation of Michael Eric Zuller of same date in support thereof, and there being no opposition thereto,

And due deliberation having been thereon and upon reading and filing the decision of this Court, it is,

ORDERED that the motion by defendant Jamaica Hospital is granted and the complaint

against it is dismissed and it is further

ORDERED, that the cross-motion of the defendants City Health & Hospital Corporation for dismissal for a failure to state a cause of action against it is granted without opposition.

And the Clerk is directed to enter judgment accordingly.

H.J.K.
J.S.C.

SUPREME COURT QUEENS COUNTY
SPECIAL TERM, PART I

ANNA BARR and ABRAHAM BARR, etc., BY KUNZEMAN,J.
vs.
CITY OF NEW YORK, et al. DATED June 6,1979
Index No.3921/76

This is a motion by defendant JAMAICA HOSPITAL to dismiss the wrongful death action against it as barred by the applicable Statute of Limitations (EPT L 5-4.1). Defendant CITY OF NEW YORK cross-moves to dismiss the complaint against it on the ground that it has no connection with defendant JAMAICA HOSPITAL.

Plaintiff's decedent was struck by an automobile and taken to JAMAICA HOSPITAL, where he died on April 13, 1970. The death certificate read: "Fractures of mandible, pelvis, tibia, fibula, humerus. Three days coma post cardiac arrest during mandibular fracture reduction: bronchopneumonia, struck by auto Van Wyck Expressway and Alantic Ave. 4/2/70." Plaintiff ABRAHAM BARR did not inquire about the cause of death at the hospital following the death of decedent, and plaintiff ANNA BARR has no recollection of making inquiry. Plaintiffs first learned of the alleged malpractice in June 1974 when Dr. J. Garsman testified during the action

for damages arising from the automobile accident. Plaintiffs allege they were deceived about the existence of a cause of action for malpractice by false death certificate.

An action for wrongful death must ordinarily be commenced within two years after the decedent's death (EPTL 5-4.1). "It is the rule that a defendant may be estopped to plead the statute of limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (Simcuski v Säeli, 44 NY2d 442, 448-9). The plaintiffs herein do not allege what specific statements defendant made to mislead plaintiffs subsequent to the death of decedent. Indeed, at their examinations before trial, plaintiff Anna Barr could not recall making inquiry at the hospital as to the cause of death, and plaintiff Abraham Barr testified that he did not make inquiry. Plaintiffs did not submit an affidavit from Dr. Garsman that shows that the death certificate was false or that decedent died from malpractice. Under the circumstances, defendant Jamaica Hospital is not estopped from relying on the statute of limitations and the complaint against it is dismissed.

The cross motion of defendant City of New York for dismissal for failure to state a cause of action against it is granted without opposition.

Submit order.

_____
J.S.C.

New York Supreme Court Queens County

PRESENT: HON. JOSEPH J. KUNZEMAN JUSTICE
SPECIAL TERM, PART I

ANNA BARR, et al,
-against-
CITY OF NEW YORK, et al.

Index Number 3931/76
Motion date Aug. 31/79
Motion Cal. Number 48
Trial Cal. Number.....

The following papers numbered 1 to ..... read on this motion by plaintiffs for leave to reargue

Upon the foregoing papers it is ordered that this motion for reconsideration the original decision is adhered to. Dated: September 13, 1979

J.S.C.

COURT OF APPEALS
STATE OF NEW YORK

ANNA BARR and ABRAHAM BARR, as ADMINISTRATORS DE BONIS non of the goods, chattels and credits of THOMAS NATHAMIEL BARR, Deceased,

Plaintiffs-Appellants,

-against-

THE CITY OF NEW YORK and NEW YORK HEALTH & HOSPITAL CORP., JAMAICA HOSPITAL, ALFRED H. SMITH, M.D. NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA, M.D., and KIMITRIOS KOTSILUMBUS, M.D.

Defendants-Respondents.

AFFIDAVIT and Brief in Support of why New York Court Appeals should hear case.

GERALD MURRAY, being duly sworn, deposes and says:

1. I am counsel for the plantiff in this action and have had personal charge of this action for him throughout.
2. This is for medical malpractice resulting in plaintiff's decedent's death.
3. Order and judgment was entered in this action in the office of the clerk of Queens, County, on Sept. 13, 1979, in favor of the defendant and against the

plaintiff dismissing complaint, which order and judgment was unanimously affirmed by order of the Appellate Division, second Department, entered in the office of the Clerk of the Appellante Division on March 10th, 1980. Judgment of unanimous affirmance was entered upon that order in the office of the Clerk of the County of Queens, on March 14, 1980.

4. An opinion was handed down by Special Term. No opinion was handed down in the Appellate Division on the Appeal.
5. The record on appeal to the Appellate Division, its order or unanimous affirmance, copies of all of which are in the possession of the plaintiff's attorney, are made a part hereof.
6. The grounds upon which such leave is asked are set forth in detail in plaintiff appellant's brief and concisely stated are as follows:

A. That such appeal is required in the interests of substaintial justice.

B. That questions of law are raised herein which are questions of general importance as follows:

Point I: Under CPLR 203 (f) Plaintiff would have two years from date of discovery to commence action.

Point II: Doctrine of Equitable Estoppel clearly prevents Defendants from raising the Statute of Limitations.

Point III: Accrual of Malpractice Action Rule in New York is not majority rule in county is inequitable, stale and harsh.

Point IV: Concealment of injuries tolls Statute of Limitations.

Point V: Malpractice Statute of Limitations does not run and has no application to other employees of hospital other than physician, surgeon or other acting in a profession similar thereto.

C. That some of these questions of law have not been passed upon by this Court. Some of these questions have been ruled in plaintiff's favor in this Court. The malpractice accrual rule is not majority view in country and should be changed.

This case is of particular interest as it poses the important question of the law in New York State as to the duties of parties as balanced by their right to rely on professionals. Not only is the law of medical malpractice involved, but of all professionals. The important query here is can a citizen of New York State safely rely on statements and/or conduct of professionals who lull them into a sense of security into believing that they have performed the particular service properly until the statute of limitations has run or can they act within a reasonable time after disvery.

The case at bar is a particularly striking one. The plaintiff's decedent died from obviously gross malpractice. The plaintiff here and counsel had no reason to suspect this and they, it is respectfully submitted relied upon the conduct statements of defendant's agents and servants, death certificate and as plaintiff had been involved in a most serious auto accident also made obvious inferences due to lack of disclosure of said malpractice. It was not until this case came to trial in June of 1974, brought out of record that the malpractice was discovered, more than four (4) years after plaintiff's decedent's death.

It is respectfully submitted that Points I through IV in reality are different avenues to accomplish the same result and should be ruled upon by this Court as it affects a great number of citizens and involves very substantial property rights, and constitutional safeguards.

For this particular case, it is also claimed that plaintiffs' were not given substantial justice.

It is also respectfully submitted that the Point V as to the negligence of a non-professional which would not even call into play the foregoing has never been commented upon by anyone other than plaintiff's counsel.

WHEREFORE, for reasons which appear in the brief of plaintiff-appellant, it is respectfully requested that leave to appeal to the Court of Appeals be granted, in accordance with the provisions of Sub-division (a) (1) of CPLR 5602 in the interest of substantial justice and questions of law as delieneated hereinbefore.

Sworn to before me
on this 27th day of March, 1980.

Notary
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF QUEENS

Gerald Murray

ANNA BARR and ABRAHAM BARR as ADMINIS TRATORS DE BONIS NON OR THE GOODS, CHATTELS AND CREDITS OF THOMAS NATHANIEL BARR, Deceased,

Plaintiff(s),

-against-

CITY OF NEW YORK, et al,

Defendant(s).

Index No. 3921/76

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

Anna Barr being duly sworn and deposes and says the following:

That I am one of the plaintiffs in this case.

As indicated on page 11 & 12 in the depostion taken by the attorneys for Jamaica

Hospital, copies of which are annexed, I testified on a Saturday or Sunday immediately prior to the decedant's death that someone spoke to me and I was very upset and they told me that his heartstopped on the operating table. That was a doctor that came down from the top floor.

I have now examined the hospital records and report of Dr. Robert R. Hyman, copies of which are annexed hereto and have given the matter a great deal of thought.

I now recall that I was told that they did a heart massage and I was told by this doctor that he died all because of a car accident.

I never knew until I examined the hospital records myself recently that the oxygen tube slipped out of his mouth and which caused his untimely death according to the opinion of Dr. Hyman,

I also referred to the death certificate which is clearly misleading which we also relied upon, which gave me the impression further more that the death was due to the car accident.

My attorney advises me under the multiple theories of law that our case should prevail.

WHEREFORE, respectfully submitted a motion for reconsideration for decision for summary judgment be granted and the motion denied, that is to deny summary judgment.

Sworn before me this
31st day of July

ANNA BARR

Notary

Robert R. Hyman M.D.
993 Park Avenue
New York, New York 10028
Telephone 212 628-2110

Gerald Murray
Attorney At Law
90-61 Sutphin Boulevard
Jamaica, New York

Re: THOMAS BARR

Dear Sir:
As per your request, I have reviewed a photostatic copy of the hospital record regarding the above patient, following injuries sustained in an automobile accident on April 2, 1970.
The patient was noted to have sustained a cardiac arrest in the operating room while undergoing surgery for repair of a fractured mandible. On one of the handwritten hospital sheets, marked number 16, there are listed three boxes in the lower half of the page for preoperative complications, operative complications and postoperative complications. In the preoperative complications, it is written, "will do nasal intubation. "In the operative complications, under April 10, 1970, the record indicates that intubation was uneventful. The tube was put through the nostril At approximately 2:25 P.M., the anesthesiologist apparently noted that the tube had slipped out of the nose. It was replaced and when he listened to the patient's heart, he heard nothing. He began to give cardiac massage, without any response. The patient was ultimately resuscitated, but never regained consciousness. He remained in a coma, and ultimately expired on April 13, 1970.
It is my impression, therefore, with a reasonable degree of assurance, that the patient's cardiac arrest can be directly attributed to the finding of the tube having slipped from the nasal intubation root and that this latter event is an episode which represents a de -

pature from good and accepted standard practice of medical care.
Review of the autopsy report rendered in this case, lists, among the cause of death following his multiple fractures, three days of coma post cardiac arrest during mandibular fracture reduction.

Very truly yours,

Robert R. Hyman, M.D.
F.A.C.S.
Diplomate, American Board of Orthopedic Surgery

NOTARY
FFH;mb

Excerpt of Anna Barr's testimony at Examination Before Trial
On page 55 of the record below Mrs. Barr testified in answer to a question as to whether anybody advised her of the prognosis for THOMAS NATHANIEL BARR'S recovery. "I can't remember. Someone did speak to me because I was very upset and they were telling me that his heart stopped on the operation, on the operating table and that some doctor came down from the top floor, the stairs or stairway or something, and he gave him, you know, whatever you call it, I don't know the medical term for it, and that was all."

DIVISION OF RECORDS
EPARTMENT OF HEALTH
BOROUGH OF QUEENS

DATE FILED APR 17 1970

CERTIFICATE OF DEATH THOMAS BARR 55

Certificate No. 156-70-405373

1. NAME OF DECEASED (Type or Print): THOMAS | R | BARR (First Name | Middle Name | Last Name)

MEDICAL CERTIFICATE OF DEATH (To be filled in by the Physician)

2. PLACE OF DEATH: a. New York City; b. Borough: QUEENS; c. Name of Hospital or Institution. If not in hospital, street address: JAMAICA HOSPITAL

3a. DATE AND HOUR OF DEATH: (Month) APRIL (Day) 13 (Year) 1970; 3b. Hour: 9:50 AM

4. SEX: MALE

5. APPROXIMATE AGE: 37 YRS.

6. I HEREBY CERTIFY that I attended the deceased from ... 14 day of APRIL 19 70 that I last saw ... alive on ... and that death occurred on the date and at the hour stated above and resulted from the causes of death stated below.

520 FIRST AVENUE N. Y. 16, N. Y.

Further certify from the investigation and post mortem examination (with ... autopsy) that in my opinion death occurred on the date and at the hour stated above and resulted from the causes of death stated below.

PART I
a. FRACTURES OF MANDIBLE, PELVIS, TIBIA, FIBULA AND HUMERUS.
b. Due to or as a consequence of THREE DAYS COMA POST CARDIAC ARREST DURING MANDIBULAR
c. Due to or as a consequence of FRACTURE REDUCTION: BRONCHOPNEUMONIA. STRUCK BY AUTO

PART II
Contributory causes not related to Part I: VAN WICK EXPRESSWAY AND ATLANTIC AVE. 4/2/70.

Signature: Millard Hilliard
MILLARD HILLIARD M.D.

M.E. Case No. 1811

Signature (Attending Physician) (Assistant) (Medical Examiner) M.D.

PERSONAL PARTICULARS (To be filled in by Funeral Director)

7. USUAL RESIDENCE: a. State: NEW YORK; b. County: Queens; c. City or Town: JAMAICA; d. Inside city limits (Yes or No): YES; e. Length of residence at place of death in City of New York immediately prior to death: 13 Years; f. Street and house number: 137-02 - 170 ST.

8. SINGLE, MARRIED, WIDOWED or DIVORCED (Write in word): MARRIED

9. NAME OF SURVIVING SPOUSE (If wife, give maiden name): DOLORES WHACK

10. DATE OF BIRTH OF DECEDENT: (Month) Dec. (Day) 31 (Year) 1933

11. AGE at last Birthday: 37 Yrs. If under 1 year: months; If LESS than 1 day: days; hrs. or min.

12a. USUAL OCCUPATION (Kind of work done during most of working life, even if retired): Driver Helper

12b. KIND of BUSINESS or INDUSTRY: Oil Truck

13. SOCIAL SECURITY NO.: 250-40-1662

14. BIRTHPLACE (State or Foreign Country): South CAROLINA

15. IF OF WHAT COUNTRY WAS DECEASED A CITIZEN AT TIME OF DEATH: U.S.A.

16. ANY OTHER NAME(S) BY WHICH DECEDENT WAS KNOWN

17. NAME OF FATHER OF DECEDENT: EASOM R. BARR

18. MAIDEN NAME OF MOTHER OF DECEDENT: WILHEMINA HUGHES

19a. NAME OF INFORMANT: DoLores BARR

b. RELATIONSHIP TO DECEASED: Wife

c. ADDRESS: 128 Stillwater Ave Queens N.Y.

20a. NAME OF CEMETERY OR CREMATORY: Rockville Cemetery

b. LOCATION (City, Town or County and State): LyNBrook L.I. N.Y.

c. DATE of Burial or Cremation: 4-17-70

21. FUNERAL DIRECTOR: GRIFFIN'S Queens Abbey Inc.

b. ADDRESS: 198-30 Hollis Ave Queens

BUREAU OF RECORDS AND STATISTICS — DEPARTMENT OF HEALTH — THE CITY OF NEW YORK

This is to certify that the foregoing is a true copy of a record on my custody.

The following are sections of appellant's brief below:

POINT III

ACCRUAL OF MALPRACTICE ACTION RULE IN NEW YORK IS NOT MAJORITY RULE IN COUNTRY AND IS INEQUITABLE STALE AND HARSH.

The view that the cause of action against a physician for malpractice begins to accrue which has been followed New York of recent, by no means a majority view of the country and it is time for the courts to reverse that position as being unfair, harsh and inequitable. California-Hundley vs. S t. Francis Hospital, 161 Cal. App. 2nd 800, Colorado-Davis vs. Bonebrake, 135 Colo. 506, Louisiana-Thomas vs. Lobrano, 76 So. 2nd 599, Missouri-Thatcher vs. DeTar, 351 Mo. 603, North Carolina-Nowell vs. Hamilton, 249 N.C. 523, Pennsylvania-Ayers vs. Morgan, 397 Pa. 282. We name only a few of the jurisdictions that do not enforce this harsh, old and stale New York inequitable rule.

POINT IV

CONCEALMENT OF INJURIES TOLLS STATUTE OF LIMITATIONS.

A case where a doctor, employee of defendant, railroad did not disclose injuries tolled statue of limitations, Mumpower vs. Southern, 270 FS 318. (FELA suit permitted beyond statue of limitations and motion for summary judgment by defendant denied.

Supreme Court, U.S.
FILED
SEP 9 1980
MICHAEL RODAK, JR., CLERK

No. 80-111

IN THE

Supreme Court of the United States

October Term, 1980.

ANNA BARR and ABRAHAM BARR, as Administrators *de bonis non* of the goods, chattels and credits of THOMAS NATHANIEL BARR, Deceased,

Petitioners,

vs.

THE CITY OF NEW YORK AND NEW YORK HEALTH AND HOSPITAL CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH M.D., NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA M.D., and KIMITRIOS KOTSILUMBUS, M.D.,

Respondents.

Brief of Respondent, Jamaica Hospital, in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the State of New York and Appellate Division, Second Department.

JOHN R. O'CONNOR
O'CONNOR AND HAYES
Attorneys for Respondent
Jamaica Hospital
337 Merrick Road
Lynbrook, N. Y. 11563
(516) 887-2434

No. 80-111

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

ANN BARR and ABRAHAM BARR, as Administrators *de bonis non* of the goods, chattels and credits of Thomas Nathaniel Barr, Deceased,

Petitioners,

vs.

THE CITY OF NEW YORK and NEW YORK HEALTH AND HOSPITAL CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH, M.D., NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA, M.D., and KIMITRIOS KOTSILUMBUS, M.D.,

Respondents.

Brief of Respondent Jamaica Hospital in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the State of New York and Appellate Division, Second Department.

Preliminary Statement.

This brief if submitted in opposition to the petition for a writ of certiorari to the Court of Appeals of the State of

New York and the Appellate Division, Second Department, for a review by this Court of a dismissal of the cause of action for wrongful death as barred by the Statute of Limitations.

Question Presented.

Petitioner alleges that the dismissal by the State Courts of the alleged cause of action for wrongful death of plaintiffs' decedent constituted a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

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22 Am. Jur. 2d (Death) §35, page 632 4

51 Am. Jur. 2d (Limitations of Actions) §12, page 598 4

51 Am. Jur. 2d (Limitations of Actions) §15, page 599 4

COURT RULES:

U. S. Sup. Ct. Rule 15(1)(d) 3

U. S. Sup. Ct. Rule 19(1)(a) 2

Statutes in Question.

The Estates, Powers and Trusts Law §5-4.1 provides as follows:

> "The personal representative, duly appointed in this State or any other jurisdiction, of a decedent who is survived by distributees and may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a Will appointing an Executor who refuses to bring such an action, the distributees are entitled to have an Administrator appointed to prosecute the action for their benefit."

Statement of the Case.

Plaintiffs' decedent was admitted to the Jamaica Hospital on April 2, 1970, after having been struck by an automobile. The deceased underwent an operative procedure for the repair of a mandibular fracture and expired at the Jamaica Hospital on April 13, 1970. A summons dated March 7, 1975, and a complaint verified on March 10, 1975, were some time thereafter served upon representatives of the Jamaica Hospital.

Among the allegations of the complaint was a contention by the plaintiffs that they had been precluded from ascertaining the nature of the malpractice claim because of fraudulent misrepresentation as to the cause of decedent's death on the part of respondent Jamaica Hospital personnel.

During the course of depositions of plaintiffs, Anna Barr and Abraham Barr, the former plaintiff indicated that she neither requested nor obtained a copy of the hospital record subsequent to the death of the decedent, nor did she have any recollection of having made inquiry of any personnel at Jamaica Hospital as to the cause of death. She categorically stated that she had no recollection of Jamaica Hospital concealing any facts from her prior to June, 1974. It was on this latter date that plaintiffs allegedly became aware of the cause of decedent's death during the course of a trial of a liability issue concerning the driver of the motor vehicle who had struck the decedent prior to his arrival at the Jamaica Hospital.

Abraham Barr, when questioned concerning the basis for his claim of fraud and misrepresentation, stated as follows:

> "I didn't ask them anything about it so I can't say that they concealed anything, because I didn't seek anything until this point."

Copies of relevant portions of the depositions were made a part of the record in the courts below.

Argument and Opposition to the Petition.

1. U. S. Sup. Ct. Rule 19(1)(a) provides in part that, while neither controlling nor fully measuring the Court's discretion, it is indicative of the character of the reasons for which certiorari will be granted, that consideration will be given "where a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accordance with applicable decisions of this Court."

Rule 15(1)(d) requires that the petitioner set forth concisely the time during which the Federal question was raised in the State Court proceedings. A reading of those two rules, coupled with the petition as set forth in support of the request for certiorari, makes it rather clear that the issue as to the constitutionality of the provisions of the New York State Law governing Statute of Limitations for wrongful death actions was never raised or decided in the State Courts below. For this reason alone, the issue as to the constitutionality of a State statute is not properly before this Court.

2. The cases cited by peititioners in support of their petition fail to establish any basis upon which it can be claimed that the dismissal of their action, based upon failure to comply with the Statute of Limitations, was in any way a deprivation of property without due process.

In *Central Land Co. v. Laidley,* 159 U. S. 103, this Court was concerned with the validity of a verification for the conveyance of real property by a married woman. It was noted in that decision that the Tenth Amendment merely prohibited interference with contract rights and the Court was not concerned with the correctness of decisions of the State Courts. The petitioner's quotation of a small portion of the decision is directly contrary to their position, since the import of the quotation set forth is that even if a decision of the highest Court in a state is clearly erroneous, it does not thereby present a question of deprivation of property without due process in contravention of the Fourteenth Amendment so as to form a basis for the granting of certiorari.

In *Fuentes v. Shevin,* 407 U. S. 67, cited by the peititioner at page 3 of the petition, the Court was faced with the constitutionality of the Florida and Pennsylvania

statutes which authorized summary seizure of goods or chattels in a person's possession under a writ of replevin. Petitioner's reliance on this case is misplaced, since these were *ex parte* applications made without opportunity to be heard. In the instant case, petitioners have been heard at *nisi prius,* the Appellate Division of the New York Supreme Court, and the Court of Appeals of the State of New York. The limited interpretation of the words "being heard," which petitioner would have this Court adopt, is that they are entitled to a full trial. This is obviously different from the position of the Court in *Fuentes* wherein it was held that a person be fully apprised of and given an opportunity to contest actions involving his rights to property.

Parenthetically, it should be noted that under New York Law, the right to recover for wrongful death is, in any event, a purely statutory right. Plaintiffs' claim to a pre-existing property right is somewhat misplaced in that the provisions of the Estates, Powers and Trusts Law, §5-4.1 make the commencement of the action within a two-year period a condition precedent to the existence of such right. The existence of such limitation upon a right for recovery for wrongful death is well known and has long been acknowledged in this Court (see 51 Am. Jur. 2d [Limitations of Actions] §15, page 599, and 22 Am. Jur. 2d [Death] §35, page 632).

It is stated at 51 Am. Jur. 2d (Limitations of Actions) §12, page 598, that "it is well recognized that the legislature of each State has a power to enact Statutes of Limitations effective within that State. The establishment of Statutes of Limitations is always a legislative prerogative." Based upon the foregoing, it is clear that the only right which plaintiffs have and of which they claim to have been deprived without due process of law, is the very right which the Statute granted them and upon which it

was conditioned that they commence their action within two years from the date of death. A rather complete treatise on the nature and history of the wrongful death statute in the State of New York is contained in *Grant v. Guidotti,* 66 A. D. 2d 545, 414 N. Y. S. 2d 171.

The other cases cited by petitioner are equally inappropriate to support the claim raised in this petition. In *Millane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, the Court merely held that notice by publication in a local newspaper was insufficient notice within the meaning of the Fourteenth Amendment as to persons whose identity and location were in fact known to the Trustee. *Boddi v. Connecticut,* 401 U. S. 371, held that due process prohibited a state from denying, solely because of inability to pay, access to its trial court to individuals who sought the dissolution of their marriages. *Brinkerhoff-Faris Trust & Savings Co. v. Hill* stands for the proposition that a state judiciary, as well as a legislature, may be guilty of deprivation of property without due process of law. This case involved discriminatory tax on bank stock because of inquality in valuation. The lower courts in that case had held that the plaintiffs had failed to exhaust an administrative remedy which, in fact, was non-existent because the same courts had consistently upheld the refusal by the agency to review questions such as those posed by petitioner. This Court held that relegating petitioner to an administrative proceeding which those courts knew was unavailable and which they specifically determined was unavailable because of the laches of the petitioner, constituted an unwarranted deprivation of property without due process and mandated reversal.

The case of *Wheeler v. Jackson,* 137 U. S. 245, cited by petitioner, in fact stands for a proposition adverse to the position argued by petitioner. In the facts of that case, a six-month Statute of Limitations within which to bring

suit against the City of Brooklyn for delivery or execution of leases which had been purchased for nonpayment of taxes, was being tested. That statute involved a shortening of a period of time within which suit could be brought. This Court, supra 225, stated as follows:

> "It is the settled doctrine of this Court that a legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which to enforce existing causes of action may be commenced, providing, in each case, a reasonable time, taking all these circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect."

Conclusion.

The petition for a writ of certiorari to the Court of Appeals and Appellate Division, Second Department, does not involve a review of a determination by a State Court of a Federal question, since no Federal question was ever raised before the State Courts. The existence of a Statute of Limitations is a well-recognized and long-standing legislative right which, in the case at bar, is not unduly burdensome.

The petition for a writ of certiorari is not designed to review factual questions as to the issue of estoppel against the Jamaica Hospital and said determination by the Courts of the State of New York is a final determination of said factual issues. Accordingly, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

O'CONNOR AND HAYES,
JOHN R. O'CONNOR, Of Counsel,
Attorneys for Respondent,
Jamaica Hospital,
337 Merrick Road,
Lynbrook, N. Y. 11563

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ANNA BARR AND ABRAHAM BARR, as Administrators DeBonis non of the goods, chattels and credits of THOMAS NATHANIEL BARR, Deceased,

Petitioner.

vs.

DOCKET NO 80-111

THE CITY OF NEW YORK AND NEW YORK HEALTH AND HOSPITAL CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH, M.D., NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA, M.D., AND KIMITRIOS KOTSILUMBUS, M.D.,

Respondents.

R E P L Y

GERALD MURRAY
Counsel for Petitioner

Office & P.O. Address
90-61 Sutphin Blvd.
Jamaica, N.Y. 11435
Tel. (212) 739-6672

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POINT I

It is respectfully submitted that the issue that certiorari was raised in the motion for permission for the Court of Appeals per brief and affidavit at 7A.

"It is respectfully submitted that Points I through IV in reality are different avenues to accomplish the same result and should be ruled upon by this Court as it affects a great number of citizens and involves very substantial property rights, and constitutional safeguards." And at page 8A.

"For this particular case, it is also claimed that plaintiffs' were not given substantial justice."

POINT II

It is respectfully submitted to the Court that the argument that plaintiffs does not have a property right by Respondent's counsel is absurd. If there was a finding of fact which would estop the Respondent from pleading the statute of limitations then the plaintiff clearly has a right to sue. To not call this a property right because there was none is an unfair play of words. When the statute was enacted is obviously granted a property right which has not existed at common law. As a matter of logic and good sense what man can say in all candor that the death of a father of all these children and husband who was the breadwinner was not a property right. Respondent never even submitted an affidavit by doctor who spoke to plaintiffs. It is

respectfully submitted that the proposition that I have stated speaks for itself, such as res ipsa in law and such as a theorum in geometry.

POINT III

The issue Respondent raises as to the Wheeler case is not even the issue of this case. This case involves a determination by a Judge of facts that are in conflict without a hearing.

POINT IV

The Courts have long recognized the right to a fair trial in criminal cases. Is not litigation over the death of the breadwinner father of the poor family - even though he has not committed a crime - entitled to as much?

Respectfully Submitted,

GERALD MURRAY